RECORD AND BRIEFS

No. 15-827

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In The Supreme Court of the United States

ENDREW F., a Minor, By and Through His Parents and Next Friends, Joseph F. and Jennifer F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

What is the level of educational benefit that local education agencies (LEAs) must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (IDEA)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTERESTS OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The IDEA Has Markedly Evolved in the Thirty-Four Years Since this Court Decided *Rowley* 4

II. *Amicus* Can Attest: A Standard More Rigorous than the "*Rowley* Standard" Is Working And Practiced Everyday "in the Field" 6

III. A Standard More Meaningful than Just-Above-Trivial Is the Norm Today 9

CONCLUSION 13

TABLE OF AUTHORITIES – Continued

Page

CASES

Bd. of Educ. v. Rowley, 458 U.S. 176 (1982) ... 3, 4, 5, 11

Forest Grove Sch. Dist. v. T.A., 557 U.S. 230 (2009) 2, 6

STATUTES

Every Student Succeeds Act, 20 U.S.C. § 6301, *et seq.* 3

Individuals with Disabilities Education Act, 20 U.S.C. § 1400 ..... *passim*

RULES

Supreme Court Rule 37 1

REGULATIONS

34 C.F.R. § 300.320 ..... 7, 8

34 C.F.R. § 300.327 5

OTHER AUTHORITIES

Educating Children with Special Needs, SPECIAL EDUC. NEWS, Nov. 10, 2016, http://www.specialednews.com/educating-children-with-special-needs.htm 11, 12

Henry M. Levin, *What are the Mechanisms of High-Poverty Disadvantages?: On the Relationship between Poverty and Curriculum*, 85 N.C.L. REV. 1381 (June 2007) 10

TABLE OF AUTHORITIES – Continued

Page

Kevin S. McGrew & Jeffrey Evans, *Expectations for Students with Cognitive Disabilities: Is the Cup Half Empty or Half Full? Can the Cup Flow Over?*, NAT'L CENTER ON EDUC. OUTCOMES SYNTHESIS REP. 55 (Dec. 2004), https://nceo.info/Resources/publications/onlinepubs/Synthesis55.html 7

Letter from U.S. Dep't of Educ., Office of Special Educ. Programs ("OSEP") (Nov. 16, 2015), http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf.....7

Michael Metz-Topodas, *Comment: Testing – The Tension between the No Child Left Behind Act and the Individuals with Disabilities Act*, 79 TEMP. L. REV. 1387 (2006).....10

National Center for Education Statistics, Table 1: Public high school four-year adjusted cohort graduation rate (ACGR), by race/ethnicity and selected demographics for the United States, the 50 states, and the District of Columbia: School year 2013-14, http://nces.ed.gov/ccd/tables/ACGR_RE_and_characteristics_2013-14.asp 8

Paul T. O'Neill, *High Stakes Testing Law and Litigation*, 2003 BYU EDUC. & L. J. 623 (2003) 10

Peter David Blanck, *ADA Study and Commentary: Employment Integration, Economic Opportunity, and the Americans with Disabilities Act: Empirical Study from 1990-1993*, 79 IOWA L. REV. 853 (1994) 11

TABLE OF AUTHORITIES – Continued

Page

Teacher Expectations: MetLife Survey of the American Teacher: Collaborating for Student Success, EDUC. WEEK (Mar. 30, 2010), http://www.edweek.org/ew/articles/2010/03/31/27report-3.h29.html 8

U.S. DEP'T OF EDUC., OFFICE OF SPECIAL EDUC. & REHAB. SVCS., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES (2002) 9

U.S. Dep't of Educ., OSEP 2002 Annual Report to Congress on the Implementation of the Individuals with Disabilities Act (IDEA), Section IV. Results, Figure IV-1, at IV-1-IV-2, https://www2.ed.gov/about/reports/annual/osep/2002/section-iv.pdf 8

INTERESTS OF *AMICUS CURIAE*

In accordance with Supreme Court Rule 37, *Amicus Curiae* National Association of State Directors of Special Education ("NASDSE") respectfully submits this brief in support of neither party.[1] NASDSE is a not-for-profit organization established in 1938 to promote and support education programs and related services for children and youth with disabilities. NASDSE's members include the state directors of special education, the Part B data managers and the 619 coordinators in the states, the District of Columbia, the Department of Defense Education Agency, the Bureau of Indian Education, federal territories and the Freely Associated States. NASDSE's mission is to work with state educational agencies to ensure that all children and youth with disabilities receive the educational supports and services they need to be prepared for post-school education, career, and independent living choices. NASDSE accomplishes its mission by establishing and maintaining relationships with those individuals and groups responsible for the development of policies, educational and other programs serving individuals with disabilities, and those responsible for

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[1] Pursuant to Rule 37.3(a), all parties received timely notice of the intent to file this brief and have consented to the filing of this brief. Letters showing such consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *Amicus* notes that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus* or its counsel made a monetary contribution to the preparation and submission of this brief.

implementation at the school, local district, state and national levels. NASDSE regularly represents its members' interests before federal courts and has participated as *amicus curiae* in several cases before this Court involving the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq. See, e.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009).

Amicus has a profound interest in the Court's resolution of the instant matter. *Amicus* and its members believe all children with disabilities have a right to a free appropriate public education. Without addressing the specific facts of this case, *Amicus* offers arguments and information from its experience "in the field" that we hope will assist this Court in reaching a decision reinforcing the use of collaborative means to resolve the disagreements arising between parents and schools in matters relating to students with disabilities. Our experience confirms that educators of students with disabilities are already providing – on a daily basis and all across the country – those students an education that is more than "just-above-trivial" and that is specifically tailored to individual student needs.

SUMMARY OF ARGUMENT

Amicus possesses decades of experience educating children with disabilities. We understand acutely the ways in which both the educational backdrop and expectations under the Individuals with Disabilities Education Act ("IDEA") have evolved in the thirty-four

years since this Court decided *Board of Education v. Rowley*, 458 U.S. 176 (1982), and the forty-one years since Congress originally enacted the IDEA. Over that time, Congress has recognized and responded to this evolution through a series of amendments to the IDEA and other federal education laws establishing significantly higher academic expectations for students with disabilities that go beyond merely providing for their inclusion. Instead, Congress has continually strengthened the requirements of the IDEA and other education laws in an effort to provide every student with disabilities a quality education and preparation for post-secondary opportunities.

Our member-educators across the country have adapted to implement these more rigorous requirements. Today, public school educators across the country set high expectations for students with disabilities – focusing on their abilities, not their disabilities – consistent with the 1997 and 2004 amendments to IDEA, as well as the 2000 amendments to the Elementary and Secondary Education Act in the No Child Left Behind Act. *See also* Every Student Succeeds Act, 20 U.S.C. § 6301, *et seq.*, P.L. 114-95.

In other words, our member-educators already apply these high standards every day in the field. We can attest that our educators are prepared to and do provide an education at a level more meaningful than the Tenth Circuit's "just-above-trivial" standard. Our educators tailor their efforts to each individual student to make sure that each student's education is *meaningful* in light of the specific abilities and educational

challenges. Our member-educators believe that this standard better serves the students and their families, the schools they attend, and the communities in which they are located.

ARGUMENT

I. The IDEA Has Markedly Evolved in the Thirty-Four Years Since this Court Decided *Rowley*.

In the 1970s, Congress began to address the educational crisis caused by wholly excluding children with disabilities from access to public schools and a meaningful public education. *See Rowley*, 458 U.S. at 179 (summarizing Congress's findings that children with disabilities "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out' "). In 1975, Congress enacted the Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975), later amended and renamed the IDEA. The Act's overarching goal was to address this crisis and create a norm of inclusion. Thus, the IDEA provided that, in all states receiving federal education funds for special education programs, every child with a disability is entitled to a free appropriate public education ("FAPE"). *Rowley*, 458 U.S. at 775. To provide a FAPE, parents and public school educators collaborate to create annual individualized education programs ("IEPs") which, consistent with the wide range of abilities

present in children with disabilities, are "tailored to the unique needs" of each child. *Rowley*, 458 U.S. at 181; *see also* 20 U.S.C. § 1414(b)(4), (d)(1)(B); 34 C.F.R. § 300.327.

This Court first addressed the requirements of the IDEA in 1982 in *Rowley*, 458 U.S. at 176. At that time, many schools were struggling to achieve the IDEA's goal of basic inclusion. Operating in that context, the Court expressly declined to specify the level of benefit to which children with disabilities were entitled. *Id.* at 202. The Court recognized that students with disabilities may have "dramatically" different capabilities. *Id.* Indeed, it cited these very differences in explaining why it declined to "establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.*

When Congress revisited the IDEA decades later, the educational backdrop had dramatically evolved. Consistent with this shifting context, the 1997 Amendments to the IDEA set significantly higher expectations for the inclusion of students with disabilities. The 1997 Amendments broadened the IDEA's goals from simply a baseline of inclusion to "ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1). In reauthorizing the IDEA, Congress required states to include children with disabilities in statewide educational assessments. *Id.* § 1412(a)(16). In sum, these amendments "place[d]

greater emphasis on improving student performance and ensuring that children with disabilities [would] receive a quality public education." *Forest Grove Sch. Dist.*, 557 U.S. at 239 (quoting S. Rep. No. 105-17, at 3 (1997)).

By 2004, public schools across the nation had implemented these more rigorous standards, including striving to provide every student a quality education and preparing students with disabilities to be able to graduate high school and prepare for full participation in life and their communities after high school. Reflecting this progress, Congress revisited the IDEA again in 2004, codifying in even stronger requirements the importance of setting "high expectations" for children with disabilities. *See, e.g.*, 20 U.S.C. § 1400(c)(5)(A) (recognizing that educators should set "high expectations" including preparing children with disabilities "to lead productive and independent lives, to the *maximum* extent possible") (emphasis supplied); § 1414(d)(1)(A)(i)(VIII) (requiring IEPs to assist children with disabilities in transitioning to post-secondary education, employment, and, if possible, independent living).

II. *Amicus* Can Attest: A Standard More Rigorous than the "*Rowley* Standard" Is Working And Practiced Everyday "in the Field."

Consistent with the IDEA's 1997 and 2004 amendments, public school educators across the nation have regularly set high expectations for and provided

meaningful educational benefits to students with disabilities. Decades of research and experience establish that the education of children with disabilities is enhanced by placing high expectations on these children – tailored to their individual abilities and potential – in order to prepare them to be college- and career-ready and to lead productive and independent adult lives. These high expectations are implemented every day in the field through carefully crafted IEPs, drafted with the participation of the parents and child, based on the child's individual needs. In crafting an IEP, educators take into account a child's present level of academic achievement, overall academic performance, and how the child's disability impacts his or her ability to be involved in and make progress in the general education curriculum. 34 C.F.R. § 300.320.

Research has demonstrated that children with disabilities can make significant academic progress related to reading and math when appropriate instruction, services, and support are provided. *See* Letter from U.S. Dep't of Educ., Office of Special Educ. Programs ("OSEP") (Nov. 16, 2015), http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf. Moreover, setting high expectations for students with disabilities correlates positively with academic achievement. *See* Kevin S. McGrew & Jeffrey Evans, *Expectations for Students with Cognitive Disabilities: Is the Cup Half Empty or Half Full? Can the Cup Flow Over?*, NAT'L CENTER ON EDUC. OUTCOMES SYNTHESIS REP. 55 (Dec. 2004), https://nceo.info/Resources/publications/onlinepubs/Synthesis55.html

("[E]xpectancy effects and academic achievement do appear to correlate positively"); *Teacher Expectations: MetLife Survey of the American Teacher: Collaborating for Student Success*, EDUC. WEEK (Mar. 30, 2010), http://www.edweek.org/ew/articles/2010/03/31/27report-3.h29.html. On the other hand, low expectations can result in children with disabilities receiving less challenging instruction and thereby "not learning what they need to succeed" at their grade level. *Id.*[2] *Amicus* strongly believes that the application of high expectations in the field have resulted in meaningful progress for students with disabilities. For example, in 2000, the graduation rate for students with disabilities was approximately 56%. U.S. Dep't of Educ., *OSEP 2002 Annual Report to Congress on the Implementation of the Individuals with Disabilities Act (IDEA)*, Section IV. Results, Figure IV-1, at IV-1-IV-2, https://www2.ed.gov/about/reports/annual/osep/2002/section-iv.pdf. Today, it is 63%, and *Amicus* expects that number to continue to rise in the future. *See* National Center for Education Statistics, Table 1: Public high school four-year adjusted cohort graduation rate (ACGR), by race/ethnicity and selected demographics for the United States, the 50 states, and the District of Columbia: School year 2013-14, http://nces.ed.gov/ccd/tables/ACGR_RE_and_characteristics_2013-14.asp.

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[2] Consistent with the goal of providing appropriate instruction, each child's IEP must include a statement of measurable annual goals designed to meet "the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum." 34 C.F.R. § 300.320(a)(2)(i)(A).

III. A Standard More Meaningful than Just-Above-Trivial Is the Norm Today.

Amicus acknowledges that it must be quite difficult for courts to adjudicate disputes under the IDEA. However, to the extent that courts *must* be involved in adjudicating these disputes, NASDSE has polled its members and, of those who responded, all expressed their belief that a standard more meaningful than just-above-trivial is the norm today. To the extent that the Court intends to define that standard in this case, *Amicus* respectfully requests that the Court carefully considers two important policy priorities. First, any standard should encourage communities to *raise* expectations regarding students with disabilities. We must create an environment where all stakeholders feel empowered to consider how the needs of all students align with, and support, the needs of children with disabilities. Second, any standard should advance the goals reflected in Congress's amendments to the IDEA to ensure that all children with disabilities receive the educational support to prepare for college and post-school integration into their communities.

Amicus does not believe that a child who receives only just-above-trivial educational benefits has received an appropriate education. Consistent with Congress's amendments to the IDEA, we should not accept low expectations for our children with disabilities, just as we would not settle for low expectations for our non-disabled children. *See* U.S. DEP'T OF EDUC., OFFICE OF SPECIAL EDUC. & REHAB. SVCS., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR

FAMILIES 36 (2002). All students, including those with disabilities, should receive an education that ensures that they are held to high academic standards with supports that are appropriate to meet their needs.

In addition, recognizing that our nation's educators aim high *every day in the field* benefits our public schools and neighborhoods as a whole. A school's overall performance can achieve real improvement where students with disabilities are given the resources they need to receive an appropriate and quality education. *See* Paul T. O'Neill, *High Stakes Testing Law and Litigation*, 2003 BYU EDUC. & L. J. 623, 624-25 (2003) (explaining that a school's overall student performance on standardized testing "can . . . have a huge impact on teachers, school, and districts" because it can affect "how much money a school receives"); Michael Metz-Topodas, *Comment: Testing – The Tension between the No Child Left Behind Act and the Individuals with Disabilities Act*, 79 TEMP. L. REV. 1387, 1400 (2006) (explaining that setting high standards for students with disabilities improves their performance on state assessments). By contrast, when students with disabilities are neglected and not challenged, that can reflect negatively on a school's progress as a whole, adversely affecting the school and the community as a whole. *Cf.* Henry M. Levin, *What are the Mechanisms of High-Poverty Disadvantages?: On the Relationship between Poverty and Curriculum*, 85 N.C.L. REV. 1381, 1404 (June 2007) ("The lower expectations for children feed the lower expectations the staff have for themselves. The staff members are often reluctant to try new ideas

because they are afraid that the ideas will not work with 'our children.'").

Finally, setting high expectations for schools empowers state directors of special education and local school district special education directors across the nation to provide services that meet the needs of individual students with disabilities at a level consistent with the IDEA's requirements. Where legal requirements appropriately recognize the need to aim high – but tailor individual expectations to the unique abilities and limitations of individual children with disabilities – more state and local resources can be deployed in service of this goal. For all of these reasons, a more meaningful standard than just-above-trivial is the right standard for children with disabilities, pubic schools, and our member-educators across the country.

Thus, based on our experience every day in the field, our members believe that setting high expectations for students with disabilities is both appropriate under the IDEA and, in fact, *works*. However, *Rowley*'s basic premise, that students with disabilities may have "dramatically" different capabilities, remains true today. 458 U.S. at 202. *See Educating Children with Special Needs*, SPECIAL EDUC. NEWS, Nov. 10, 2016, http://www.specialednews.com/educating-children-with-special-needs.htm ("Special education instructors work with youths and children with a wide range of disabilities."); *cf.* Peter David Blanck, *ADA Study and Commentary: Employment Integration, Economic Opportunity, and the Americans with Disabilities Act: Empirical Study from*

1990-1993, 79 IOWA L. REV. 853, 863 (1994) ("Persons with disabilities encompass a wide range of individuals."). Students' disabilities can range from a significant cognitive disability or autism to a mild to moderate learning disability. *See Educating Children with Special Needs*, *supra*. Because of that broad spectrum of abilities and potential, the proper standard must be sensitive to the individual abilities of each student; due consideration must be accorded at an individualized level to academic, physical, and health needs, among other child-specific characteristics.

For all of these reasons, our members respectfully suggest that any legal standard adopted in this case should take account of what our members are already doing every day "in the field" – namely, applying the requirements enacted by Congress and providing students with educational benefits that are *meaningful* in light of the students' potential and the IDEA's stated purposes.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court consider our experience and observations in its resolution of this case.

Respectfully submitted,

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